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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANITA VALENZUELA,

Plaintiff,

vs.

LIME FINANCIAL SERVICES, LTD et al.,

Defendants.

3:10-cv-00502-RCJ-VPC

ORDER

This is a standard foreclosure case involving one property. The Complaint is a forty-three-page MERS-conspiracy-type complaint listing eleven causes of action. The case is not part of MDL Case No. 2119. Three motions are pending before the Court: a motion to remand, a motion to dismiss, and a motion for summary judgment.

I. THE PROPERTY

Plaintiff Anita Valenzuela gave a \$340,000 mortgage to Lime Financial Services, Ltd. ("Lime") to purchase a home at 7272 Offenhauser Dr., Reno, NV 89511 (the "Property"). (Deed of Trust ("DOT") 1-3, July 28, 2006, ECF No. 1-2). First Centennial Title Company of Nevada ("First Centennial") was the trustee. (*See id.*). As of December 12, 2009, she had defaulted in the amount of \$26,093.71. (*See* NOD 1, Dec. 9, 2009, ECF No. 7-4). LSI Title Agency ("LSI"), as agent for National Default Servicing Corp. ("NDSC"), as agent for Litton Loan Servicing ("Litton") filed the NOD. (*See id.* 2). Litton, as agent for Bank of America, then purported to

1 substitute NDSC as trustee on January 26, 2010. (See Substitution of Trustee, Jan. 26, 2010, ECF
2 No. 7-3). The Property was sold by NDSC to Bank of America, as trustee for a mortgage-
3 backed security, on May 26, 2010. (Trustee's Deed, June 2, 2010, ECF No. 7-6).

4 MERS, as nominee for Lime, had purported to transfer "all beneficial interest under [the
5 DOT]" to Bank of America on January 26, 2010. (See Assignment, Jan. 26, 2010, ECF No. 7-2).
6 Regardless of the language in the DOT, MERS is not in fact the beneficiary because it does not
7 own the debt. MERS also does not have the ability to transfer the interest in the loan without
8 more evidence of its agency on behalf of Lime in this regard than being named as nominee on
9 the DOT. In other words, based on the evidence produced, the DOT remains with Lime at this
10 point, or with whatever entity currently holds the note, by operation of law. Bank of America
11 may have a worthless piece of paper if it only has an "assigned" deed of trust without having had
12 the note that the deed of trust secures negotiated to it. See *Rodney v. Ariz. Bank*, 836 P.2d 434,
13 436 (Ariz. App. 1992) (quoting *Hill v. Favour*, 52 Ariz. 561, 568 (1938)); *Ord v. McKee*, 5 Cal.
14 515, 515 (1855) ("A mortgage is a mere incident to the debt which it secures, and follows the
15 transfer of the note with the full effect of a regular assignment."). MERS purported in the
16 "Assignment of Deed of Trust" to transfer the "beneficial interest" to Bank of America for value,
17 which would in fact give Bank of America the right to enforce the note even without negotiation,
18 see Nev. Rev. Stat. § 104.3203(2), but MERS likely did not have the ability to make such a
19 transfer.¹ The foreclosure may have been statutorily invalid both because NDSC filed the NOD
20 before it was substituted as trustee by Bank of America and before MERS purported to transfer
21 the beneficial interest to Bank of America, both of which would be improper even assuming
22 Bank of America eventually had the beneficial interest via the transfer from Lime by MERS.

23
24 ¹Defendants could cure this defect via an affidavit from Lime indicating that Lime
25 specifically commanded MERS to transfer Lime's interest in the note to Bank of America, or
that MERS' agency for Lime extended this far as a general matter.

1 The only meritorious claim is for injunctive relief based on a violation of NRS section
2 107.080(2)(c). The “quiet title” claim is redundant with that for “declaratory judgment,” *see*
3 *Kress v. Corey*, 189 P.2d 352, 364 (Nev. 1948), and the claim for injunctive relief obviates the
4 need for a separate declaration.

5 II. ANALYSIS

6 A. Motion to Remand

7 The Court denies the motion to remand, as there is federal-question jurisdiction. Plaintiff
8 has pled a cause of action for a violation of NRS section 649.370, which incorporates the
9 standards of the Fair Debt Collection Practices Act (“FDCPA”).

10 First, section 649.370 creates no private cause of action,² so the claim that refers to
11 FDCPA necessarily relies directly on the federal cause of action.

12 Second, even if the Court found an implied state cause of action, it would necessarily
13 require substantial interpretation of federal law, because a violation of the state statute is defined
14 purely by reference to FDCPA. *See Mesi v. Wash. Mut. F.A.*, No. 3:09-CV-582 JCM (VPC),
15 2010 WL 3025209, at *2 (D. Nev. July 30, 2010) (Mahan, J.). *Contra Atkinson v. Homecomings*
16 *Fin., LLC*, No. 3:10-cv-00418-LRH-VPC, 2010 WL 3271741, at *2 (D. Nev. Aug. 16, 2010)
17 (Hicks, J.) (“[C]ontrary to Defendants’ position, the act defines a state claim that is separate from
18 its federal counterpart. Although a federal regulation is expressly noted in the Nevada statute,
19 the reference to the federal act only provides a framework for determining the type of claim that
20 can be brought under the state statute.”). The Court respectfully believes that the *Mesi* case is
21 better reasoned. Although an appropriately drafted state statute could incorporate federal
22 standards in such a way that a violation of federal standards would be sufficient, but not

23
24 ²Neither “damages,” “cause of action,” nor “attorney’s fees” appear anywhere in Chapter
25 649. The Chapter provides only for criminal penalties or administrative fines. *See Nev. Rev.*
Stat. §§ 649.435, 649.440.

1 necessary, to constitute a violation of the state statute, in the present case the Nevada Legislature
2 has made the reach of section 649.370 coextensive with FDCPA and its attendant regulations.
3 See Nev. Rev. Stat. § 649.370 (“A violation of any provision of the federal Fair Debt Collection
4 Practices Act, 15 U.S.C. §§ 1682 *et seq.*, or any regulation adopted pursuant thereto, shall be
5 deemed to be a violation of this chapter.”). The *Atkinson* court reasoned that because the Nevada
6 Supreme Court had resolved other sections of Chapter 649 without reference to federal law, a
7 section 649.370 claim could be resolved without the substantial interpretation of federal law. See
8 *Atkinson*, 2010 WL 3271741, at *2 (citing *State v. Hartford Accident & Indem. Co.*, 477 P.2d
9 592 (Nev. 1970)). But *Hartford* did not involve the resolution of any section of Chapter 649 that
10 made reference to federal law, much less section 649.370, which was enacted thirty-seven years
11 after *Hartford* was decided. See 2007 Nev. Stat. 2500; *Hartford*, 477 P.2d at 593 (interpreting
12 former section 649.080, which did not rely on any federal law). The fact that some sections of
13 Chapter 649 can be applied without interpreting federal law tells us nothing about whether any
14 other particular section therein can be. Plaintiff has not pled any violation of Chapter 649 except
15 section 649.370, which is by its text coextensive with FDCPA. Therefore, any claim under
16 section 649.370 necessarily requires the substantial interpretation of federal law, and there would
17 be federal-question jurisdiction even if a private cause of action lied under Chapter 649 such that
18 Plaintiff did not need to rely on FDCPA directly.

19 Federal-question jurisdiction can be based purely on a state claim if its resolution
20 necessarily requires the construction of federal law:

21 The rule is well settled that a state claim “arises under” federal law “if the
22 complaint, properly pleaded, presents a substantial dispute over the effect of federal
23 law, and the result turns on the federal question.” *Guinasso v. Pacific First Fed. Sav.
24 & Loan Ass’n*, 656 F.2d 1364, 1365–66 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020,
102 S. Ct. 1716, 72 L. Ed. 2d 138 (1982). The “vast majority of cases brought under
25 the general federal-question jurisdiction of the federal courts are those in which
federal law creates the cause of action[.]” *Merrell Dow Pharmaceuticals Inc. v.
Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986), but
a case may also arise under federal law “where the vindication of a right under state

1 law necessarily turn[s] on some construction of federal law.” *Id.* (quoting *Franchise*
 2 *Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S. Ct. 2841,
 2846, 77 L. Ed. 2d 420 (1983)).

3 *Berg v. Leason*, 32 F.3d 422, 423 (9th Cir. 1994). In cases such as the present one, where the
 4 state claim directly incorporates the substance of federal law, *see* Nev. Rev Stat. § 649.370, and
 5 where the state claim raises no federal constitutional issues, federal-question jurisdiction exists
 6 only if the federal law that is incorporated into the state claim provides an independent federal
 7 claim:

8 In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S. Ct.
 9 3229, 92 L. Ed. 2d 650 (1986), the Court considered in detail the principles of
 10 removal jurisdiction when applied to a well-pleaded complaint that relies on a state
 11 cause of action which incorporates federal law as one of the elements of recovery.
 12 The Court held that in such a case, the state claim does not involve a substantial
 federal question unless the federal law incorporated in the state cause of action
 provides a federal private right of action for its violation. *Id.* 106 S. Ct. at 3237; *see*
also Utley v. Varian Assoc., Inc., 811 F.2d 1279 (9th Cir.) (applying *Merrell Dow*),
cert. denied, 484 U.S. 824, 108 S. Ct. 89, 98 L. Ed. 2d 50 (1987).

13 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1394 n.4 (9th Cir. 1988). The FDCPA provides
 14 a private right of action. *See* 15 U.S.C. § 1692k. If NRS section 649.370 contained additional
 15 substantive bases for liability apart from FDCPA, then such bases of liability could be invoked
 16 without creating federal-question jurisdiction. But section 649.370 refers exclusively and
 17 coextensively to FDCPA for its substance and provides no basis for liability apart from that
 18 provided for in FDCPA, under which a private, federal right of action lies. The Court therefore
 19 finds that even if a private cause of action lied under section 649.370 (none does), such a claim
 20 would support federal-question jurisdiction. *See Ethridge*, 861 F.2d at 1394 n.4.

21 **B. Motions to Dismiss and for Summary Judgment**

22 Rather than responding to the motions, Plaintiff’s counsel, as he typically does in these
 23 cases, has filed a “Notice of Intent to Withhold Response.” This constitutes consent to granting
 24 the motions. Local R. Civ. Prac. 7-2(d). Counsel has no authority to institute a partial stay of a
 25 case unilaterally, which is what these notices essentially purport to do. And the requirement to

1 file an opposition is not a "burden" imposed by a potentially improper removal, as counsel has
2 argued in other similar cases, because Defendants surely would have filed the same dispositive
3 motions had the case not been removed. In fact, Plaintiff would only have had ten (10) days to
4 respond to such motions in state court before failure to respond constituted consent to granting
5 them, whereas he had fifteen (15) days to respond in this Court. *Compare* Nev. Dist. Ct. R.
6 13(3), *with* Local R. Civ. Prac. 7-2(b). Removal therefore had the effect of giving Plaintiff an
7 additional five days to respond to these inevitable motions, in addition to the delay in
8 Defendants' filing of the motions created by the removal process itself. There is simply no
9 legitimate excuse for failing to substantively respond. In addition to constituting consent to
10 grant the motions to dismiss under Local Rule 7-2(d), this willful failure to respond to
11 dispositive motions might violate Nevada Rule of Professional Conduct 1.1, which requires
12 competent representation.

13 The typical complaint in these cases involves a defaulted mortgage and a clean
14 foreclosure. In a minority of cases, such as this one, the foreclosure appears statutorily defective
15 because the foreclosing entity, i.e., the entity that filed the NOD, was not the trustee, beneficiary,
16 or agent of one of those entities when it filed the NOD. *See* Nev. Rev. Stat. § 107.080(2)(c). In
17 such cases, a preliminary injunction is appropriate to stop foreclosure where the mortgagor is
18 willing to do equity by making payments during the preliminary injunction period. The Court
19 has in fact issued preliminary injunctions in such cases. Also, a permanent injunction
20 invalidating a foreclosure or even avoiding a foreclosure sale would be appropriate in a case
21 where a mortgagor were willing to do equity by curing the entire default. Such a case has not yet
22 presented itself in this Court.

23 CONCLUSION

24 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 3) is DENIED.

25 IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 16) and the Motion

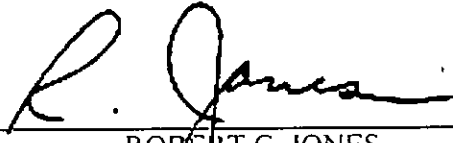
1 for Summary Judgment (ECF No. 7) are GRANTED in part and DENIED in part. All claims are
2 dismissed except the claim for injunctive relief due to statutorily defective foreclosure.

3 IT IS FURTHER ORDERED that Defendants will not transfer or lease the Property or
4 take any action to evict Plaintiff from the Property for one-hundred (100) days. During this
5 period, Plaintiff will make full, regular monthly payments under the note every thirty (30) days,
6 with the first payment due ten (10) days after the date of this order. The amount of each
7 payment will be according to the monthly payment as of the date of the NOD. Failure to make
8 monthly payments during the injunction period will result in a lifting of the injunction. Plaintiff
9 need not pay late fees or cure the entire amount of past default at this time but may be required in
10 equity to cure the entire past default as a condition of any future permanent injunction voiding
11 the trustee's sale.

12 IT IS FURTHER ORDERED that during the injunction period the parties will engage in
13 the state Foreclosure Mediation Program, if available. If not available, Defendants will conduct
14 a private mediation with Plaintiff in good faith. The beneficiary must send a representative to
15 the mediation with actual authority to modify the note, although actual modification is not
16 required. Plaintiff will provide requested information to Defendants in advance of the mediation
17 in good faith.

18 IT IS SO ORDERED.

19
20 Dated this 19th day of January, 2011.

21
22 
23 ROBERT C. JONES
24 United States District Judge
25